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Department of Industrial Relations
State of California
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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

KELLETH CHINN and CAROLINE WAMPOLE, professionally known as "BIG SOUL", Petitioners, vs. GEORGE E. TOBIN, an individual dba GEORGE TOBIN MUSIC, Respondent.	No. TAC 17-96 DETERMINATION OF CONTROVERSY

BACKGROUND

Petitioners, Kelleth Chinn and Caroline Wampole, are musicians professionally known as the musical group "Big Soul", who entered into two written agreements with Respondent, George Tobin, on June 22, 1993 - - an "Artist Agreement" and a "Personal Management Agreement." Respondent is the owner of a business that is engaged in the recording and publishing of music. At all relevant times herein, both parties resided in and did business in the State of California.

Under the "Artist Agreement", petitioners agreed to render their "exclusive recording services" to Respondent, that Respondent would be the sole owner of all master recordings recorded during the term of the agreement, that Respondent and

anyone else authorized by Respondent (e.g., a major record label) would have exclusive rights to manufacture records from these master recordings, and to permit the public performance of these recordings; that Respondent would hold the publishing rights to any compositions recorded by petitioners, and that Respondent could subsequently assign all or part of these rights to a publishing company. In return, Respondent agreed to commercially exploit and finance the production of petitioner's recordings, and to pay various recording costs, advances to petitioners, and royalties. The Artist Agreement also provided that Respondent could produce, at his discretion, music videos, and that Respondent would be the sole owner of the rights to any such videos, with petitioners entitled to royalties based on any profits that may result from the commercial exploitation of such videos.

Pursuant to the Artist Agreement, Tobin arranged for Petitioners' use of a professional recording studio and sound engineer, and secured and paid for the services of session musicians to record with Petitioners. Tobin also undertook efforts to promote Petitioners' recordings with record industry executives and with radio programmers through meetings and the distribution of promotional CD recordings. Respondent paid over $43,000 for recording studio time, recording tape, the services of studio musicians and the sound engineer, and costs of other materials.

Under the "Personal Management Agreement", petitioners agreed that Respondent would serve as their "exclusive personal manager" and "adviser . . . in connection with all matters relating to

Artist's professional career in all branches of the entertainment industry. . . ." The Personal Management Agreement gave Respondent the authority to function as petitioners' attorney-in-fact with respect to various matters. Of primary interest here, under paragraph 3(c) of the Personal Management Agreement, Respondent was authorized, "subject to Artist's approval after consultation with Manager and in accordance with paragraph 7 hereof, [to] prepare, negotiate, consummate, sign, execute and deliver for Artist, in Artist's name or in Artist's behalf, any and all agreements, documents and contracts for Artist's services. . . ." Paragraph 7 of the Personal Management Agreement states: "Artist understands that Manager is not an employment agent, theatrical agent, or artist's manager, and that Manager has not offered, attempted or promised to obtain employment or engagements for Artist, and that Manager is not permitted, obligated, authorized or expected to do so. Manager will consult with and advise Artist with respect to the selection, engagement and discharge of theatrical agents, artists' managers, employment agencies and booking agents (herein collectively called "talent agents") but manager is not authorized hereunder to actually select, engage, discharge or direct any such talent agent in the performance to [sic] the duties of such talent agent."

As compensation for respondent's services provided under the Personal Management Agreement, petitioners agreed to pay commissions to the respondent in an amount equal to 20% of petitioners' gross earnings in the entertainment industry, including but not limited to earnings derived from activities in motion pictures, television, radio, theatrical engagements, public

appearances in places of entertainment, records and recording, except that respondent would not be entitled to commissions on any record royalties or advances paid to petitioners pursuant to the Artist Agreement. In accordance with this provision, Respondent did not deduct any commissions from the advances that were paid to Petitioners pursuant to the Artist Agreement.

The term of the Personal Management Agreement is defined as "equal to and co-terminus to the term of the Artist Agreement", while Artist Agreement states that it "shall terminate concurrently with the [Personal] Management Agreement should the [Personal] Management Agreement terminate for any reasons whatsoever . . . ."

On or about May 17, 1996, respondent filed an action in the Los Angeles Superior Court against Kelleth Chinn, Caroline Wampole, and various other defendants seeking damages for breach of contract with respect to obligations purportedly arising from this Artist Agreement and Personal Management Agreement. Shortly thereafter, petitioners filed this petition to determine controversy, alleging that respondent acted in the capacity of a talent agency without having been licensed by the State of California, and that these two agreements are void from their inception and unenforceable by virtue of respondent's violation of Labor Code §1700.5.

Pursuant to both parties' claims that this controversy could be decided without an evidentiary hearing, a pre-hearing conference was held on October 7, 1996 in San Francisco, California, before the undersigned attorney for the Labor Commissioner, specially designated to hear this matter.

Petitioners were represented by David D. Stein; respondent was represented by David C. Phillips, David M. Given and Steven F. Rohde. Based on the evidence and argument presented at this hearing, and after considering the post-hearing briefs and declarations that were filed, the Labor Commissioner adopts the following determination.

LEGAL ANALYSIS

At all times relevant herein, Respondent was not licensed as a talent agency. Labor Code §1700.5 provides that "no person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner." The term "talent agency" is defined at Labor Code §1700.4(a) as "a person or corporation who engages in the occupation of procuring, offering, promising or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring, offering or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing." It is undisputed that petitioners are artists under Labor Code section 1700.4(b), as "musical artists," "composers," and "lyricists" are expressly defined as "artists.". The question that is presented here is whether respondent acted as a "talent agency" within the meaning of section 1700.4(a).

In essence, petitioners' case boils down to the allegation that respondent "procured employment" for Big Soul, within the meaning of Labor Code section 1700,4(a), by obtaining their songwriting services for his own music publishing business, and thereby violated the Act by not being licensed as a talent agent

in accordance with Labor Code section 1700.5. This claim is succinctly presented in the Petition to Determine Controversy as follows: "Petitioners allege that Respondent wrongfully seeks to secure for himself valuable publishing rights in the original compositions authored by Petitioners."[1] No evidence of any sort was presented to indicate that Respondent procured, offered, attempted or promised to procure employment for Petitioners, with respect to Petitioner's song writing services, for any person or entity other than the Respondent himself and Respondent's music publishing business. We do not believe that this alone would establish a violation of the Talent Agencies Act, in that a person

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[1] Although Labor Code section 1700.4(a) exempts "procuring, offering, or promising to procure recording contracts for an artist" from the scope of activities or which a talent agency license is required, this exemption does not expressly extend to the procurement of music publishing contracts. The Talent Agencies Act has long been construed by the courts as a remedial statute intended for the protection of artists. "[T]he clear object of the Act is to prevent improper persons from being [talent agents] and to regulate such activity for the protection of the public. . . ." Buchwald v. Superior Court (1967) 254 Cal.App.2d 347, 351. See also Waisbren v. Peppercorn Productions (1995) 41 Cal.App.4th 246. As with all remedial legislation, exemptions must be strictly construed and cannot be extended beyond their express provisions. To do otherwise would defeat the remedial purpose of the legislation.

Respondent argues, however, that the rights granted to him under the music publishing provision of the Artist Agreement are expressly defined to include only those musical compositions that are "recorded by [Petitioners] under this [Artist] Agreement", that these music publishing rights were therefore dependent upon and "merely incidental to" the recording contract, and thus, that these music publishing rights fall within the statutory exemption for recording contracts. This argument ignores the fact that music publishing and recording are two separate endeavors, that musicians who compose and record their own songs may have separate music publishing and recording contracts, that there are recording artists who are not songwriters, and that there are songwriters who are not recording artists. We therefore conclude that music publishing and songwriting does not fall within the recording contract exemption, regardless of whether the right to publish an artist's music is limited only to compositions that are contained on that artist's record.

or entity who employs an artist does not "procure employment" for that artist, within the meaning of Labor Code section 1700.04(a), by directly engaging the services of that artist. Instead, we hold that the "activity of procuring employment," under the Talent Agencies Act, refers to the role an agent plays when acting as an intermediary between the artist whom the agent represents and the third-party employer who seeks to engage the artist's services.

Petitioners' novel argument would mean that every television or film production company that directly hires an actor, and that every concert producer that directly engages the services of a musical group, without undertaking any communications or negotiations with the actor's or musical group's talent agent, would itself need to be licensed as a talent agency under the Act. To suggest that any person who engages the services of an artist for himself is engaged in the occupation of procuring employment for that artist, and that such person must therefore be licensed as a talent agent is to radically expand the reach of the Talent Agencies Act beyond recognition. The Act "must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers - - one . . . that will lead to wise policy rather than mischief or absurdity." Buchwald v. Superior Court (1967) 254 Cal.App.2d 347, 354-355. The purpose of the Act was to require licensing of agents, that is, individuals who represent artists by attempting to obtain employment for such artists with third party employers. We can find nothing in the legislative history of the Talent Agencies Act that would even remotely indicate any legislative intent to require the licensing of employers who directly offer employment

to artists, and to construe the Act in such a manner would lead to absurd results. Nor are we aware of any prior Labor Commissioner determinations or court decisions that have held that an employer violates the Talent Agencies Act by engaging the services of an artist for himself without being licensed as a talent agent. The cases cited by Petitioners - - Church v. Brown (1994) TAC 52-92 and Humes v. MarGil Ventures, Inc. (1985) 174 Cal.App.3d 486 - - do not lend support to that contention.

The respondent in Church v. Brown was not licensed as a talent agent and was employed as the casting director for the film production company which produced the film "Stolen Moments" and which employed Thomas Haden Church as an actor in the production of this film. But those were not the facts that the Labor Commissioner relied on in holding that Ross Brown had violated the Talent Agencies Act. Indeed, there is no requirement that a casting director employed by a production company and who works exclusively for that production company be licensed as a talent agent in order to hire actors to work for the production company. Rather, the Labor Commissioner determined that Brown initialy violated the Act by engaging in fradulent activities outside the scope of his employment as a casting director that violated his primary duty to the producers and that created a conflict of interest between himself and the producers. Specifically, Brown created a false resume for Church, containing several false credits regarding Church's prior work, as a means of ensuring that Church would get hired by the "Stolen Moments" production company. Thereafter, Brown told Church that he expected to be paid commissions equal to 15% of Church's gross earnings on "Stolen

Moments". Following the completion of "Stolen Moments", Brown undertook continuous efforts to procure employment for Church - - with third party employers - - and repeatedly promised Church that he would procure such employment. These activities included arranging employment interviews, sending out resumes and photographs, and calling casting directors. Thus, despite the fact that Brown's business relationship with Church began while Brown was the casting director for the production company that employed Church, the true nature of Brown's role - - based on the specific evidence presented - - was that he went far beyond his job as the production company's casting agent to become Church's talent agent.

In Humes v. MarGil Ventures, Inc., supra, 174 Cal.App.3d 486, the court reversed the lower court's confirmation of the Labor Commissioner's determination against a respondent, holding that the respondent's right to due process was violated when the Labor Commissioner proceeded with a hearing that respondent was unable to attend because of his incarceration. The appellate court decision did not address the substantive merits of the controversy between the artist and the putative agent, and did not review the Labor Commissioner's determination of the merits. In its recitation of facts, however, the court noted that in 1978 respondent Gilbert Cabot entered into an agreement whereby he was to act as Mary Humes "personal manager", that two years later Humes and Cabot formed a "theatrical production company" called MarGil Ventures "for the purpose of developing and advancing Humes' professional acting career", that Humes then entered into an "exclusive employment agreement" with MarGil, and that one year

later Humes filed a petition to determine controversy with the Labor Commissioner under Labor Code section 1700.44, seeking a determination that Cabot and MarGil violated the Talent Agencies Act by procuring employment for her and negotiating contracts with third party employers without having been licensed under Labor Code section 1700.5. The essence of the Labor Commissioner's determination, and the reason that respondents' procurement activities were found by the Labor Commissioner to have violated the Act, was that MarGil was a "theatrical production company" in name only; that it was not engaged in the production of any entertainment or theatrical enterprises, but rather, merely functioned as a loan-out company for providing Humes' artistic services to third party producers. Humes' "employment agreement" with MarGil notwithstanding, these third party producers were the persons or entities with whom she was seeking employment. And it was Cabot's activities as a talent agent - -his efforts in procuring and attempting to procure employment for Humes with these third party producers - - that violated the Talent Agencies Act.

The Labor Commissioner reached the determination that it did in MarGil by examining the substantive reality behind the contractual language. "The court, or as here, the Labor Commissioner is free to search out illegality lying behind the form in which the transaction has been cast for the purpose of concealing such illegality." Buchwald v. Superior Court (1967) 254 Cal.App.2d 347, 355. At the pre-hearing conference in this matter, the parties were ordered to submit declarations or some offer of proof as to whether respondent promised or attempted to

procure or did procure employment for petitioners with any third parties in violation of the Talent Agencies Act. The undersigned hearing officer invited the submission of this sort of evidence precisely in order to look beyond the written agreements, to determine whether these agreements were merely a subterfuge intended to conceal the actual nature of the parties' business relationship. Petitioners' papers filed in response to this order failed to present any evidence, or offer of proof, that respondent ever procured or promised or offered or attempted to procure employment for petitioners with any third party.[2] That lack of evidence as to promises or offers to obtain employment with third parties or actual procurement activities is what distinguishes this case from Buchwald and its progeny. Here, search as we might, we are unable to discern any "illegality lying behind the form in which the transaction has been cast."

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[2] Petitioners did present evidence that Tobin "made several attempts to obtain major [record] label distribution for Big Soul" and had contacts with at least one European "subpublisher". These activities were consistent with Tobin's rights under the Artist Agreement, with respect to his ownership of Big Soul's recordings and compositions. Tobin was not negotiating with these record companies and subpublishers to employ Big Soul, but rather, to distribute Big Soul's records and compositions (both of which were owned by Tobin, the employer of Big Soul's artistic services). In this respect, Tobin's role was analogous to an independent television production company that hires actors and other necessary employees for the production, that bears the expenses incurred in completing the production, that owns the movie or television series that it produced, and that has the right to enter into distribution agreements with networks for this movie or series. The Talent Agencies Act does not require that an independent television producer be licensed to engage in such activities. There is no reason to treat an independent music producer any differently. And the evidence presented here leaves no doubt that Tobin is a bona fide music producer, in contrast to the fictitious "theatrical production" company that was created in MarGil for the purpose "loaning out" the artist's services to third party producers as a means of evading the Act's licensing requirement.

Petitioners argue that the agreements that are the subject of this dispute are illegal on their face in that they contain the promise to procure employment that triggers the need for a talent agency license. This argument is unavailing. As discussed above, there are no provisions in the Artist Agreement which, on their face, are violative of the Talent Agencies Act. The Personal Management Agreement is worded in a manner that carefully avoids violating the Act. The paragraph of the Personal Management Agreement that purports to give Tobin the authority to negotiate and consummate employment agreements on behalf of Big Soul grants this authority to Respondent "in accordance with" another paragraph of the Agreement that states that Tobin "is not permitted, obligated, authorized, or expected" to obtain employment or engagements for Big Soul, and that Tobin shall consult with Big Soul in the selection or engagement of any talent agent. It would be an understatement to say that these seemingly contradictory provisions, taken together, are less than a model of clarity. But absent any evidence to the contrary, we are forced to conclude that it was the parties' intent that these contract provisions be construed in a manner that complies with the Talent Agencies Act.

It is a basic principle of contract law that a contract must be given such an interpretation as will make it lawful, if it can be done without violating the intentions of the parties. (Civil Code section 1643.) Pursuant to Labor Code section 1700.44(d), a person not licensed as a talent agent may "act in conjunction with, and at the request of, a licensed talent agency in the negotiation of a contract." See, Barr v. Rothenberg (1992)

TAC 14-90 [dismissing petition on ground that unlicensed "manager" who engaged in negotiations for artist's employment did so in conjunction with and at the request of petitioner's licensed talent agency]. We therefore construe paragraphs 3(c) and 7 of the Personal Management Agreement as allowing Tobin to engage in only those procurement activities, and only under those circumstances that are permitted by Labor Code section 1700.44(d). Here, had Petitioners presented any evidence that Tobin, without acting in conjunction with and at the request of a licensed talent agency selected by Big Soul, made any promises or undertook any attempts to obtain or negotiate the terms of employment for Big Soul with third party employers, there would be a basis to conclude that the prohibitory language contained in paragraph 7 of Personal Management Agreement, and its adoption by reference into paragraph 3(c) of that Agreement, was nothing more than a pretext designed to misrepresent or conceal the true nature of Tobin's activities. But without such evidence in this regard, we must conclude that the prohibitory language of the Personal Management Agreement means what it says, and was not a subterfuge. See, Raden v. Laurie (1953) 120 Cal.App.2d 778.

ORDER

For the reasons set forth above, the petition to determine controversy is hereby DISMISSED on the ground that Petitioners failed to present evidence that Respondent engaged in the occupation of a talent agency, within the meaning of Labor Code section 1700.4(a), so as to require licensure under Labor Code section 1700.5. The Talent Agencies Act does not therefore operate to make either the Artist Agreement or the Personal

Management Agreement unlawful or void ab initio.

We express no opinion on the question of whether an agreement requiring artists to provide their artistic services exclusively to the same person who is representing those artists under the terms of a personal management agreement results in an inherent conflict of interest and the inevitable violation of the personal manager's fiduciary duties towards those artists, or whether such a conflict of interest or violation of fiduciary duties existed here. We leave that issue for the court to decide in the context of the ongoing litigation between these parties, as the Labor Commissioner is without jurisdiction to proceed further, having found that based on the evidence here, no talent agency license was required.

Dated: 3/24/97

Miles E. Locker

MILES E. LOCKER
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: 3/26/97

John C Duncan

JOHN C. DUNCAN
Chief Deputy Director
DEPARTMENT OF INDUSTRIAL RELATIONS

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS - DIVISION OF LABOR STANDARDS ENFORCEMENT

CERTIFICATION OF SERVICE BY MAIL
(C.C.P. §1013a)

(KELLETH CHINN & CAROLINE WAMPOLE pka "BIG SOUL" v. GEORGE TOBIN)
(dba "GEORGE TOBIN MUSIC" TAC 17-96)

I, MARY ANN E. GALAPON, do hereby certify that I am employed in the county of San Francisco, over 18 years of age, not a party to the within action, and that I am employed at and my business address is 45 Fremont St., Suite 3220, San Francisco, CA 94105.

On March 26, 1997, I served the following document:

DETERMINATION OF CONTROVERSY

by placing a true copy thereof in envelope addressed as follows:

DAVID D. STEIN, ESQ.
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and then sealing the envelope with postage thereon fully prepaid, depositing it in the United States mail in the city and county of San Francisco by ordinary first class mail and by fax.

I certify under penalty of perjury that the foregoing is true and correct. Executed on March 26, 1997, at San Francisco, California.

Mary Ann E. Galapon
MARY ANN E. GALAPON